

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of:

Implementation of Sections 11 and 13
of the Cable Television Consumer
Protection and Competition Act of 1992

Horizontal and Vertical Ownership
Limits, Cross-Ownership Limitations
and Anti-Trafficking Provisions

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY
MM Docket No. 92-264

To: The Commission

REPLY COMMENTS OF VIACOM INTERNATIONAL INC.

VIACOM INTERNATIONAL INC.

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Viacom International Inc. ("Viacom"), by its attorneys, hereby submits its reply comments in response to the Report and Order and Further Notice of Proposed Rule Making, FCC 93-332 (rel. July 23, 1993) ("FNPRM"), released in the above-referenced proceeding. Viacom's comments herein are limited to matters relating to vertical ownership limitations.¹

I. Overview

Throughout this proceeding, Viacom has cautioned that, in setting channel occupancy limits, the Commission should ensure that it minimizes, to the extent possible, the infringement upon important constitutional rights that flow directly from channel occupancy limits and that it does not impede the implementation

¹ Viacom has participated extensively throughout this proceeding and has commented on a variety of issues that will not be addressed here. Accordingly, these comments must be read in conjunction with, and as supplemental to, those earlier filings.

of technological advances. See, e.g., Comments of Viacom International Inc. (Feb. 9, 1993) at 2-4.

In furtherance of these goals, Viacom strongly urges the Commission to establish, in this proceeding, a threshold beyond which the channel occupancy limits will not apply. The Commission has recognized that it is "most likely" that expanded channel capacity will eliminate the need for the channel occupancy limits. FNPRM at ¶ 226. The imposition of a direct restraint on speech in a situation in which the Commission has found that it "most likely" will not be needed could not withstand constitutional scrutiny.

Moreover, the Commission should consider that the increased capacity that will result from the deployment of fiber optic and digital technology can be used to provide subscribers with a wide variety of beneficial services in addition to a greater selection of traditional program services. As explained more fully in Viacom's initial comments in response to the FNPRM, setting a threshold beyond which the channel occupancy limits will not apply will encourage cable operators to invest in and develop such pro-consumer services and, indeed, enable them to implement them. See Comments of Viacom International Inc. (August 23, 1993) at 4-5.

Accordingly, Viacom once again urges the Commission to establish that the channel occupancy limits will not apply to channel capacity in excess of 54 channels.

II. The Commission Has Ample Statutory Authority to Implement Proposals That Will Enhance Cable Operator Flexibility in Programming Their Systems

Congress has given the Commission broad discretion to promulgate rules to implement Section 11 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act" or the "Act"), in ways that could accommodate cable operator programming flexibility. For example, in the initial Notice of Proposed Rule Making released in this proceeding, the Commission noted that the Act failed to provide any real guidance regarding the procedures to be used in calculating channel occupancy limits. Notice of Proposed Rule Making in MM Docket No. 92-264, 8 FCC Rcd 210, 219 (1992) ("NPRM").

The National Association of Telecommunications Officers and Advisors ("NATOA"), however, seeks to inhibit the Commission's ability to fashion rules by arguing that the Commission lacks the statutory authority to take certain of its proposed actions. For example, NATOA claims that the FCC may not phase out channel occupancy limits in situations in which the cable operator is subject to effective competition. NATOA Comments at 12. Similarly, NATOA asserts that the Commission lacks authority to grandfather existing carriage of program services. Id. NATOA's essential argument is that, because Congress did not explicitly provide for such rules, the Commission is constrained from promulgating them.

Contrary to NATOA's claims, the Act merely directs the Commission to "conduct a proceeding . . . to prescribe rules and regulations establishing reasonable limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest." 1992 Cable Act, § 11(c)(2); 47 USC § 533(f)(1)(B) (emphasis added). This directive to establish "reasonable limits" is limited in the Act only by a list of public interest objectives that the Commission should seek to further. *Id.* The Commission's proposals are well within the scope of the Act and NATOA's arguments that the Commission's proposals exceed its statutory authority should be rejected out of hand.

III. The Channel Occupancy Limit Should be Set at 50% or Higher

The Motion Picture Association of America ("MPAA") urges the Commission to set the channel occupancy limit at 20% of activated channel capacity. Comments of MPAA at 7. Although, as stated above, the Commission has wide discretion under the 1992 Cable Act to promulgate channel occupancy limits, the Commission's discretion is significantly constrained by constitutional imperatives, as demonstrated in Viacom's prior comments in this proceeding. *See, e.g.,* Comments of Viacom International Inc. (Feb. 9, 1993) at 2-4. In fashioning channel occupancy rules, the Commission must ensure that it does not trample upon fundamental First and Fifth Amendment rights.

Viacom has grave doubts that any scheme that deprives a cable operator of the ability to program a majority of its capacity can pass constitutional muster. See, e.g., Comments of Viacom International Inc. (August 23, 1993) at 2. Accordingly, Viacom submits that the channel occupancy limit should be set at 50% or higher in order to provide any plausible argument that the restriction is constitutionally valid.

IV. The Calculation of Channel Capacity Should Include All Activated Channels, Including PEG, Leased Access and Broadcast Channels

The vast majority of commenters agree with the Commission that all activated channels should be included in the calculation of a system's channel capacity. See, e.g., Comments of MPAA at 9; Comments of National Cable Television Association at 14. The Commission properly has determined that carriage of PEG, leased access and broadcast channels all further the goal of the channel occupancy provision by adding to the diversity of voices on a cable system.

NATOA, however, opposes the inclusion of these channels in the determination of channel capacity. NATOA Comments at 6-7. Significantly, NATOA does not dispute the Commission's determination that it would be unreasonable to exclude these channels -- which all serve to increase diversity -- from the base used to compute the number of channels available for carriage of vertically integrated programming. Lacking any

evidence to disprove its determination, the Commission would be acting in an arbitrary and capricious fashion in failing to include all activated channels. Further, as discussed above, the Commission's proposal is well within its rulemaking discretion.

V. The Commission (Rather Than State or Local Authorities)
Should Be Responsible for Enforcing the Channel
Occupancy Limits

The Commission has proposed that it be responsible for monitoring and enforcing compliance with the channel occupancy limits. FNPRM at ¶ 242. NATOA -- once again a lone voice crying in the wilderness -- claims that franchising authorities should be given primary responsibility for monitoring and enforcing the channel occupancy limits. NATOA Comments at 4.

Viacom urges the Commission to adhere to its proposal that it bear the primary responsibility for enforcement of the channel occupancy rules. As demonstrated in Viacom's initial comments in this proceeding, local enforcement would be unwieldy. Indeed, it is possible that, in a situation in which a single cable system serves multiple franchise areas, local authorities could come to different conclusions about whether or not the operator of that system is in compliance with the channel occupancy rules. Comments of Viacom International Inc. (Feb. 9, 1993) at 18-19. As the Commission has reasoned, the often complex corporate structures of cable operators, combined with the need to interpret and apply consistently the Commission's attribution

criteria, point to the Commission as the only logical enforcement entity. Viacom submits that a simple way of ensuring compliance is to require each vertically integrated cable operator to provide an annual certification to the Commission. See Comments of Viacom International Inc. (Feb. 9, 1993) at 19.

VI. Conclusion

For the foregoing reasons, Viacom urges the Commission to adopt the proposals set forth herein and in its earlier comments in this proceeding.

Respectfully submitted,

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